

2011 WL 2192354 (Ind.App.) (Appellate Brief)  
Court of Appeals of Indiana.

Terry Allen WAGSTER, Appellant (Defendant below),  
v.  
STATE OF INDIANA, Appellee (Plaintiff below).

No. 45A03-1011-CR-590.  
April 19, 2011.

Appeal from the Superior Court of Lake County, Cause No.  
45G04-0907-FC-81, Hon. Thomas Stefaniak, Jr., Judge Pro Tem

**Brief of Appellee**

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**\*1 STATEMENT OF THE ISSUE**

Whether the court imposed an appropriate sentence.

**STATEMENT OF THE CASE**

*Nature of the Case*

Terry Allen Wagster (“Defendant”) appeals from his conviction of exploitation of an endangered adult,<sup>1</sup> a class D felony (App. 1, 4--5; Docket). *Course of the Proceedings*

On July 8, 2009, the State charged Defendant with Counts I and II: fraud on a **financial** institution,<sup>2</sup> a class C felony; and Counts III and IV: exploitation of an endangered adult, a class D felony (App. 2, 8-9). On August 25, 2010, the Defendant entered into a stipulated plea \*2 agreement with the State and pled guilty to Counts III and IV: exploitation of an endangered adult (App. 2, 19-21; Tr. 10).

On September 29, 2010, and October 20, 2010, the court held a bifurcated sentencing hearing (Tr. 14, 76). On October 20, 2010, entered a judgment of conviction finding Defendant guilty on Counts III and IV, and dismissed, per the State's motion, Counts I and II (App. 1, 34). On the same day, the court sentenced Defendant to the Department of Correction, with an initial placement in the Kimbrough Work Program, for three years on each count, to be served concurrently, with credit for a total of 266 days credit (App. 1, 34; Tr. 85). On November 22, 2010, Defendant filed his notice of appeal (App. 1, 4-5; Docket). On November 29, 2010, the clerk issued a notice of completion of the record (App. 35-36; Docket). On February 15, 2011, the clerk issued a notice of completion of the transcript (App. 37; Docket). On March 17, 2011, Defendant timely filed his Brief of Appellant, and served the State by mail (Docket).

### STATEMENT OF FACTS

The victims in the instant case, S.B. and C.B., were both over sixty years old and had turned over their health care and **financial** care to Golden Care Home Health Care (“Golden Care”) due to mental incapacity (App. 22). Defendant was employed by Golden Care from May 28, 2009 until June 8, 2009 (App. 22). During his employment, Defendant wrote five unauthorized checks to himself from S.B. and C.B.'s checking account (App. 22). The amount of the checks totaled \$2,600 (App. 22). Additional facts from the record will be incorporated as necessary and cited accordingly.

### SUMMARY OF ARGUMENT

The trial court imposed an appropriate sentence for Defendant's crimes. Defendant committed his crimes against two bedridden individuals suffering from dementia whose goal was \*3 to die in their own homes. Instead, the victims lost their money, were forced to depend on Medicaid, were moved to a nursing home, and died within a week of being admitted there (App. 26-27). Defendant's crimes against these victims had an extreme and heartrending impact upon their lives.

Furthermore, Defendant is a drug addict who has received the benefit of short terms of incarceration, probation, and seven or eight drug treatment programs in the past. Instead of calling his therapists when he faced a relapse, however, Defendant chose to discontinue his mental health medications and go on a drug binge with his girlfriend. Thus, Defendant's twelve-year sentence to the DOC is entirely appropriate.

### ARGUMENT

#### **The Court imposed an appropriate sentence upon Defendant.**

The trial court imposed an appropriate sentence considering the nature of Defendant's crimes and his character. An appellate court may revise a sentence authorized by statute only where the court, after due consideration of the trial court's sentencing decision, finds that the sentence imposed is inappropriate in light of the nature of the offense and the defendant's character. *Ind. Appellate Rule 7(B)*; *Casady v. Stale*, 934 N.E.2d 1181, 1191-92 (*Ind. Ct. App.* 2010). Upon reviewing a sentence for appropriateness, an appellate court does not merely substitute its judgment for that of the trial court. *See Book v. State*,

880 N.E.2d 1240, 1252-53 (Ind. Ct. App. 2008), *trans. denied*. Indeed, our Supreme Court has recently reiterated that, when reviewing a defendant's sentence, it is a "requirement" that the appellate court to give the trial court's decision "due consideration." See *Akard v. State*, 937 N.E.2d 811, 813-14 (Ind. 2010). The defendant carries the burden to convince the appellate court that the sentence imposed is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007); *Kennedy v. State*, 934 N.E.2d 779, 788 (Ind. Ct. App. 2010).

#### **\*4 Nature of the offense:**

Contrary to Defendant's claim, a three-year sentence is appropriate. A person who commits a class D felony shall be imprisoned for a fixed term of between six months and three years, with the advisory sentence being one and one-half years. I.C. § 35-50-2-7. Defendant acts in the instant case are despicable. Defendant victimized an **elderly**, bedridden couple, both in the early stages of dementia (App. 27). His victims, S.B. and C.B. had a wish to stay in their home until they died (App. 27). Because Defendant violated his position of trust and took this **elderly** couple's money, they did not receive that wish (App. 27). S.B. and C.B. were forced to receive Medicaid, which to them meant depending on the government--an unacceptable outcome in their opinion--and move into a nursing home (App. 27). This, in turn, increased this **elderly** couple's anxiety and "put them over the edge," and "made them want to give up" (App. 27). "They started refusing food and medications" (App. 27). S.B. and C.B. both died the week after being admitted to the nursing home (App. 27).

S.B. and C.B.'s daughter, Catherine Cole, suffered as well because of Defendant's criminal acts against her parents. Catherine and her mother were very close (App. 26). Catherine and her husband traveled from Florida to Indiana to assist S.B. and C.B. (App. 26). Catherine's husband took off work to be there, but soon returned to Florida while Catherine stayed in Indiana for another month (App. 26-27). When the couple could no longer afford for Catherine to stay in Indiana, she returned to Florida where sorting out the many issues that had arisen from Defendant's crimes, which involved a considerable amount of work (App. 27). But most painful of all, Catherine soon lost both parents.

A defendant's crimes can have far-reaching effects on the victims and their families, and Defendant's violation of his position of trust with this **elderly** couple unfortunately illustrates this \*5 all too well. The court found that "the impact upon these people to be extremely significant" (Tr. 61). Thus, Defendant's egregious acts justify the three-year sentence imposed upon him by the court.

#### **Character of the offender:**

Defendant's character warrants the three-year sentence. Defendant wrote the checks to feed his drug addiction (Tr. 33). The **elderly** victims of this case were too ill to understand that Defendant was stealing their money (App. 26). The bank eventually caught Defendant on video when he tried to cash a check for \$3,000--which Defendant admitted that he planned to use to buy drugs (Tr. 37; App. 26). Defendant's addiction to drugs surfaced in his late teens or early twenties (Tr. 33). Defendant was in his early thirties when he was arrested for the instant offenses (App. 38). During the intervening years, Defendant has had the opportunity to engage in drug **abuse** treatment seven or eight times (Tr. 41). Despite being offered treatment such as Team Challenge and support from his family, Defendant repeatedly relapsed (Tr. 23). When asked why Defendant did not take his mental health medications, Defendant replied, "I really don't have an explanation for that either. I get mad and frustrated and, you know, just the heck with everything and decide to self medicate sometimes" (Tr. 39-40). And, with that cavalier attitude, Defendant decided to steal \$2,600 from S.B. and C.B., and was finally caught when he tried to steal \$3,000 more.

Defendant has had previous contact with the justice system. As a juvenile, Defendant was given probation for battery, and sent to the Indiana Boy's School for conversion (App. 39). Defendant's legal troubles reveal his disrespect for the law, fellow citizens, and even his own family, and demonstrate an unwillingness to learn from his past criminal conduct. Defendant, who has **bipolar disorder**, ADHD, and other mental health issues, discontinued taking the \*6 medications prescribed to treat these conditions, and instead relapsed because his girlfriend started using at that time (Tr. 33, 35). The court found that Defendant's

testimony revealed himself as one who has not taken responsibility of his actions, but instead excuses his criminal conduct in all directions but his own choices (Tr. 61-62). When testifying about his relapse, Defendant explains, “It is just something that occurs. And, you know, I try to deal with it as best I can. I have therapists. You know, I have people that I am supposed to contact when I feel that way. And for the most part I try to do that.” (Tr. 40). Defendant indicates by his testimony that he knows what he is supposed to do when he feels that he is relapsing, but instead he chose to steal a considerable amount of money from a couple suffering from dementia, ultimately contributing to their downfall. Thus, Defendant has failed to show that his three-year sentence is inappropriate.

### CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to affirm the trial court in all respects.

#### Footnotes

- 1 Ind. Code §35-46-1-2.
- 2 I.C. § 35-43-5-8.

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